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COMPETITION AND THE LAW.

COMPETITION is considered here from the legal point of view — not from the economic point of view. The great mode of modern life, competition must have a place in law as well as a place in economics. For the law must deal with men as it finds them; the law must recognize that men are in a state of competition; concerning rights and wrongs in that competition, the law must have something to say. A first factor in society, competition must be a fundamental topic in law. It is true that competition does not appear as the usual name of a usual topic in the law, yet there is a set of rules in the law in relation to competition. It is proposed here to collect the more important of these rules; and the attempt will be made to collate them. To determine, that is, when competition is held no tort, and when competition is held a tort. All will be in outline. There will be hypothesis here without demonstration. General principles will be stated without proper qualifications. The large divisions of the subject will be exposed; but the special issues will not be brought forward. In fact, what is made here is a classification. The detail is left to the learning of the reader. Thus only principal cases will be discussed; and there will be small citation of authorities other than these. For all that is hoped to be come at is some disposition of competition by the law.

A first principal division of the subject is concerned with the extent to which competition is allowed. Is the competition in

every business open to every one? — this is the issue here. That certainly is not the fact in the world. The world as we know it has many limitations. Most of these are social barriers. So that the right at law is often an empty right. Yet men demand it. As competition is in the abstract elemental in our society, competition must be in the abstract fundamental in our law. To social barriers men submit — to no legal barriers. That is the general situation. At law we see the competition in almost every business is open to almost every man. Every man may keep a grocery if he wishes. But that is not true to the whole extent; for in certain businesses competition is limited by our laws. Every man may not run a street railway if he wishes. In the first case competition would be a right; in the second case competition would be a wrong. To a wide extent, then, competition is seen to be free; to a narrow extent competition is seen to be unfree. That is a line of demarcation to be established.

Let two early cases in our books be compared.[1] A master of a grammar school at Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiff had formerly received 40*d.* a quarter from each child, now he got only 12*d.* to his damage. Counsel contended that this interference shown and this damage proved made a good action on the case; he cited that the masters of Paul's claimed that there should be no other masters in all London except themselves. But the judge said: There is no ground to maintain this action; since the plaintiff has no estate but a ministry for the time; and though another equally competent with the plaintiff comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law. Contrast with that case this case of the same century. The Prior of Dunstable brought a writ of trespass against J. B. of Dunstable, butcher, and counted that the right to the market in this vill belonged to the prior, but that nevertheless this butcher had sold his meats secretly upon his own premises upon a certain market day, to the wrong and to the damage of the prior. Counsel of the butcher argued that any one might in that vill sell his own goods on his own premises or anywhere else at his pleasure at any time. The judge said promptly that could not be; for the prior would lose all advantage of his franchise of the market, if one might sell his merchandise upon

[1] Y. B. 11 Hen. IV. 47; Y. B. 11 Hen. VI. 19.

market day elsewhere than in the stalls of the prior, paying to him toll. The first case one sees holds that trade is free; more than that, it sets forth that competition should be free. The second case holds that where there is a franchise trade is not free; more than that, it decides that the policy of the law should be to defend franchise. Indeed, these cases stand at the parting of the ways. In the fifteenth century a society based upon unfree trade lay behind; and a society based upon free trade lay before. What with the many and various franchises that confronted one in the country,[1] what with the many and various gilds that barred one in the towns, it was clear what the policy of the state had been. Yet, at the same time, in a society based upon franchise, we find competition declared; for the times were even then at their change. The law of these two cases taken together is the law to-day: competition is no tort — unless there be invasion of a franchise. But the policy of the law has undergone a change: in those times, the courts looked askance at competition; in these times the courts look with disfavor upon franchise.

Indeed, that rule of law is so fundamental that the issue is not found to be in litigation in later books. Snowden *v.* Noah[2] may be such case. As soon as one party established a newspaper in opposition to the other party, that other asked for an injunction against solicitation of his customers. The Chancellor said: The business of publishing newspapers is free to all; the loss to one establishment which may follow from the competition of a rival establishment is a consequence of that freedom; mere competition, therefore, gives no claim for legal redress. Perhaps, Pudsey Gas Company *v.* Bradford[3] is such a case. There suit was based upon the diversion of consumers from one gas works to the other gas works. The decision was that the loss so caused, however great, could be no private injury on principle. Such a case seems Ricker *v.* Railway.[4] The proprietors of the Poland Spring had previously brought all comers to their hotels by stage from Danville Junc-

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[1] COMPETITION UNFREE: UNDER THE MANORIAL SYSTEM. — Y. B. 22 Ed. I. 270; Y. B. 3 Ed. III. 3; Y. B. 11 Hen. VI. 19; Ferness *v.* Brooke, Cro. Eliz. 203; Bowestone *v.* Hardy, Cro. Eliz. 547; Case of Forest, Cro. Jac. 155; Hix *v.* Gardner, 2 Bulstrode 195; Fitzswaller's Case, 3 Keeble 242; Mayor *v.* Lambert, Willes 111. UNDER THE GILD SYSTEM. — Davenant *v.* Hurdis, Moore 245; Weaver *v.* Brown, Cro. Eliz. 803; London's Case, 5 Coke 616; Wagoner's Case, 8 Coke 121; Franklin *v.* Green, 1 Bulstrode 11; Wannels *v.* London, 1 Strange 675; Cuddon *v.* Eatwick, 1 Salk. 193; Gunmakers *v.* Fell, Willes 384; R. *v.* Surgeon, 2 Burr. 892; R. *v.* Harmon, 3 Burr. 1322.

[2] Hopkins Ch. 347. [3] L. R. 15 Eq. 167. [4] 90 Me. 395.

tion. Later, the defendant built a railway and established a station, Poland Springs, much nearer the hotels. It was held properly: Because the plaintiffs for a series of years had run a stage from Danville Junction afforded no legal right to exclude another route; all this was mere competition; therefore it was not open to legal objection. And this must be so that mere competition is no tort. Why, then, this effort in all modern cases to show something untoward in the competition? Indeed, it may be seen that such must have been the rule. Otherwise merchants would have been in ceaseless litigation. The inventor of the first type of the machine would have sued the inventor of the second type of the machine. And if these suits could have succeeded, that wide extent of modern trade would never have been reached. That quick march of the inventions would never have been made. There would have been no nineteenth century.

At times a judge will put a supposititious case, however. In Commonwealth *v.* Hunt,[1] Chief Justice Shaw imagines this case: Suppose a new baker sets up against an old baker. Prices are reduced; the old baker is damaged; he therefore sues. The chief justice says: No legal wrong is done; the same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition that the best interests of trade and industry are promoted; of this competition there are a thousand modern instances. In Allen *v.* Flood,[2] Lord James of Hereford proposes this case: An architect seeks to be employed to the exclusion of his rivals. He says: "My plans are the best, and following them will produce the best house at the least cost. Therefore employ me and not A. or B." Can these rivals sue? His Lordship says not, clearly: Every man's business is liable to be interfered with by such action; of course no suit can be brought for such interference; competition, indeed, represents interference; but it is in the interest of the community that competition should exist.[3] In Doremus *v.* Hennessey,[4] Justice Phillips supposes this case: one tradesman intends to drive his rival out of business. It is true that no one may invade the business of another without lawful cause, he says; but lawful competition is

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[1] 4 Met. 134.

[2] [1898] A. C. 179.

[3] FREE COMPETITION. — Y. B. 11 Hen. IV. 47; Y. B. 22 Hen. VI. 14; Case of Monopolies, 11 Coke 85; Hopkins *v.* R. R., L. R. 2 Q. B. D. 224; Pudsey Co. *v.* Bradford, *supra;* Ricker *v.* R. R., *supra;* C. *v.* Hunt, *supra;* Snowden *v.* Noah, *supra.* And see lists following.

[4] 176 Ill. 608.

always a justification. This, then, appears as the apology for this policy — a theory that a free competition is for the best interest of society. The law does its best when it gives to every man an equal chance. An economic theory, one sees, not a legal theory. The state permits the struggle of competition for its own ends.

There is an exception — franchise. The extent to which franchises shall be granted depends upon the fiat of the state. In a society founded upon competition, the state will be found to leave all but the whole field to competition; yet there is a place for franchise. The state grants franchises for the ferry and the bridge, for the turnpike and the canal, for the railroad and the tram, for light and water, and for like businesses. And such franchises may be defended,[1] since in such public utilities it seems that competition does not work for the best interests of the public. The state may do well to withdraw such public services from the field of competition; for it is no inconsistency not to apply a general principle in a situation where it is inapplicable. And experience has shown that when the field is left open to competition in these public services, there is an inevitable result — in the end it will be found that there is no competition; and that the community must pay for the experiment. Moreover, the law puts upon these public callings which have more or less of monopoly most strict obligations. In a public calling all who apply must be served and served at reasonable rate;[2] whilst in the private callings one may sell to whom one pleases at any price one pleases.[3] That is a proper distinction that the law makes between a non-competitive business and a competitive business. Note that in the public callings

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[1] FRANCHISE. — Binghamton Bridge, 3 Wall. 75; Gas Co. *v.* Light Co., 115 U. S. 650; Sands *v.* River Improvement, 123 U. S. 288; Coe *v.* R. R., 127 U. S. 40; Bartholomew *v.* Austin, 85 Fed. 359; Railway *v.* Railway, 2 Gray 1; Street Railway *v.* Street Railway, 69 Mo. 65; Donnelly *v.* Vandenberg, 3 Johns. 27; Patterson *v.* Wollman, 5 No. Dak. 608.

[2] REGULATION OF NON-COMPETITIVE CALLINGS. — Jackson *v.* Rogers, 2 Show. 327; Alnut *v.* Inglis, 12 East 527; Denton *v.* G. N. R. R., 5 E. & B. 860; Munn *v.* Ill., 94 U. S. 113; Railroad Commission Cases, 116 U. S. 307; Smythe *v.* Ames, 169 U. S. 466; Price *v.* Irrigating Co., 56 Cal. 431; State *v.* Portland Co., 153 Ind. 483; Publishing Co. *v.* Associated Press, 184 Ill. 438; Telephone Co. *v.* Telegraph Co., 66 Md. 399; Laurence *v.* Pullman Co., 144 Mass. 1; Messenger *v.* Pa. R. R., 8 Vroom 531; C. & M. R. R. *v.* B. & M. R. R., 67 N. H. 464; State *v.* C. N. O. & T. R. R., 47 Oh. St. 130; State *v.* Steele, 106 N. C. 766.

[3] REGULATION OF COMPETITIVE CALLINGS. — Brass *v.* Stoeser, 153 U. S. 391; Holden *v.* Hardy, 169 U. S. 360; Braceville Co. *v.* P., 147 Ill. 66; Brewster *v.* Miller, 101 Ky. 368; Singer *v.* Md., 72 Md. 464; Com. *v.* Perry, 155 Mass. 117; State *v.* Loomis, 115 Mo. 307; Matter of Jacobs, 98 N. Y. 98; State *v.* Dalton, 22 R. I. 77; Ladd *v.* Press, 53 Tex. 172.

there is not the regulation by competition; while in the private callings there is always the regulation of competition. Hence, we see that the most rigid restrictions are placed by our laws upon the conduct of public callings, while a broad freedom to trade as one will is given by our laws to those in private callings. And, what is to the point here, it is because a public calling is so subject to public regulation, that there is no danger in the withdrawal of the regulation of competition.

At all events, the courts have no choice but to recognize the right created by such a grant of a franchise. Upon one ground alone the courts can dispute the grant: the lack of capacity in the grantor. In Street Railway *v.* Street Railway,[1] a municipality was held to have no power to grant an exclusive right to one street railway although the charter gave the municipality full power of regulation. Only when they must will the courts recognize such grants. But next in interpretation of the extent of the grant the courts have a policy. It is at that stage we find a stern rule — the rule of Charles River Bridge *v.* Warren Bridge.[2] In that particular case it was held that the authorization of a toll bridge did not prevent the authorization of a free bridge sixteen rods away. Since then it has been recognized that competition is never to be excluded unless there is express stipulation against it. The principle has had a further extension. In Illinois Canal *v.* Chicago Railroad,[3] the express franchise of a canal company was held not invaded by the construction of a parallel railway. Thus only that sort of competition which is by precise provision enjoined will be excluded. A modern instance is Railway Company *v.* Telegraph Association.[4] There a telephone company with a franchise was held to have no action against an electric traction company for disturbance of the established ground circuit of the telephone by the introduction of the ground circuit of the single trolley system of the railway. Apparently an express franchise does not avail against the conflict of new conditions. Such strict rules of construction as these could not be unless there were a certain cast in the minds of the courts — the large policy that competition shall be free cuts the grant down as much as interpretation may.[5] Of

[1] 79 Ala. 470. [2] 11 Pet. 420. [3] 14 Ill. 314. [4] 48 Oh. St. 390.

[5] EXTENT OF FRANCHISE. — Charles River Bridge *v.* Warren Bridge, *supra;* Horse Railway *v.* Cable Road, 30 Fed. 388; Gas Co. *v.* Saginaw, 28 Fed. 529; Street Railway *v.* Street Railway, *supra;* Gas Co. *v.* Gas Co., 25 Conn. 19; Canal *v.* Railroad, *supra;* Water Co. *v.* Syracuse, 116 N. Y. 178; Railway Co. *v.* Telegraph Assn., *supra;* Parkhurst *v.* R. R., 23 Ore. 474; Brenham *v.* Brenham Water Co., 67 Tex. 567; Turnpike Co. *v.* R. R., 21 Vt. 895; Canal *v.* R. R., 11 Leigh 73.

course if there be an express franchise and if there be a clear invasion, the courts must declare that competition a tort.

A second principal division of the subject is concerned with the methods by which competition is allowed. May competition be carried on by every method? — this is the issue here. Common knowledge of business transactions shows many limitations. Certain methods of getting trade are held permissible; certain other methods of getting trade are held not permissible. The law must leave the widest scope possible to methods in trade; and yet there are certain rights here that must be protected from violation. The law draws lines here. Suppose in one case a customer is taken from a rival by mere persuasion, obviously the rival has no suit. But suppose a customer is taken from a rival by open violence, obviously then the rival has a suit. In the first case the method of competition is held to be fair; in the second case the method of competition is held to be unfair.

What competition, then, is held fair? Perhaps as good a case as any to show what is permitted is Ayer *v.* Rushton.[1] The defendant in that case put a sign in front of his store: Depot of the Cherry Pectoral Company. The defendant also instructed his clerks to say: Rushton's Pectoral was much better than Ayer's Pectoral. The defendant also posted a placard: Ayer's Pectoral, one dollar; Rushton's Pectoral, 50 cents — which will you have? Of course it was held that all this was no more than fair competition. For is it not fair to sell goods under their proper names, even if thereby advantage is taken to some extent of the trade established by a rival? Parsons *v.* Gillespie[2] is a principal case upon that point. The plaintiff was first in the field with flaked oatmeal; but that it was held did not exclude a rival from producing by the same process and offering for sale under the same name the same product. If that were not so there would be an end to competition. And is it not fair to open another shop even if some trade is diverted? In Choynski *v.* Cohen,[3] the plaintiff first opened an "Antiquarian Book Store," then the defendant opened an "Antiquarian Book Store." The court said: The defendant had only described his store; any one might open a ladies' shoe store; it was no different here. And is it not fair to claim the same advantages for your wares as for wares of a rival? In Tallerman *v.* Dowsing Heat Company,[4] the proprietor of one heat treatment was first to operate. The system got some commendation from the medical peri-

[1] 7 Daly 9. [2] [1898] A. C. 239. [3] 39 Cal. 501. [4] [1900] 1 Ch. 1.

odicals. So, when the defendant entered the field, he instanced these testimonials as commendation of the heat treatment in general. The court refused to interfere. And is it not fair to compare goods of the seller with the goods of a rival? White *v.* Mellin[1] is the leading case as to that. The proprietor of one food advertised: Dr. Vance's food is far more nutritious and healthful than any other preparation. The proprietors of Mellen's food sued for the disparagement. It was held: Advertisements of this sort appear fair enough; every extravagant praise may be used by a tradesman in commendation of his own goods; it may attract trade to him and diminish the business of others; but of such disparagement by comparison the law takes no cognizance. And is it not fair for one tradesman to undersell another? Ajello *v.* Worsley[2] decides that. Ajello was a maker of pianos, and Worsley was the proprietor of a furniture emporium. Worsley testified that his business policy was to select a certain line of goods to sell below cost; thereby he would get customers into his establishment to buy other goods priced to yield a good profit. In this particular case he marked down a piano of the Ajello make; and the result was that no other retailer could afford to sell the Ajello piano. Now Ajello sues Worsley for the damage to his trade. The court holds: There is no cause of action; the owner of property may dispose of it for such price as he sees fit; a trader is entitled to carry on his business in any lawful way, whether it causes loss to others in the trade or not. And may a trader say it is not fair if a rival has made an arrangement which is to his prejudice? In Walsh *v.* Dwight[3] it appears that contracts were entered into by the manufacturers of Cow Brand Saleratus with the jobbers of the commodity, by which the jobbers agreed not to sell any other brand of saleratus below the price of the Cow Brand. The Cow Brand was widely advertised; hence the other brands could not be sold at the same price; thus the scheme damaged the manufacturers of the other brands; but they recovered nothing at law. It is clear that in the last analysis there is nothing done in all these cases that is not usual in competition; nor is anything done that is not proper in competition;[4] for indeed these methods are the

[1] [1895] A. C. 154. [2] [1898] 1 Ch. 274. [3] 40 N. Y. App. D. 513.

[4] COMPETITION FAIR. — Evans *v.* Harlow, 5 Q. B. 624; Younge *v.* McCrae, 3 B. & S. 634; Jenner *v.* Abeckett, L. R. 7 Q. B. D. 11; White *v.* Mellen, *supra;* Parson *v.* Gillespie, *supra;* Ajello *v.* Worsley, *supra;* Tallerman *v.* Dowsing Co., *supra;* Print Works *v.* Dry Goods Co., 105 Fed. 163; Choynski *v.* Cohen, *supra;* Cohn *v.* Lahn, 26 Alb. L. J. 342; Johnson *v.* Hitchcock, 15 Johns. 185; Tobias *v.* Harland, 4 Wend. 537; Lovell Co. *v.* Houghton, 54 N. Y. Supr. Ct. 60; Ayer *v.* Rushton, *supra;* Walsh *v.* Dwight, *supra.* And compare lists following.

very processes of competition; and if these methods were not allowed in competition that whole benefit from competition for which society stipulates would cease.

What competition, then, is held unfair? Certain methods in competition it has been seen are fair; while certain other methods it will be seen are unfair. All depends upon the method practised in the particular case. Suppose competition be defined in the abstract case as the diversion of a customer from one competitor to another. Then it occurs to inquire as to the position of the customer. Put this case: The customer is under a contract to deal with the first merchant. Then put this case: the customer is dealing with the first merchant, but there is no contract. There is a distinction here. In the one case a second merchant must, to succeed in competition, induce the customer to break his contract with the first merchant; it seems that there may be found an element of wrong in such competition. In the other case there is, as has been seen, no tort in the mere competition; what must be attacked is the means employed to divert the customer.

Of that first situation the leading case, as is well known, is Lumley *v.* Gye.[1] There it will be remembered a Miss Wagner was under contract to sing for the first manager; the second manager induced Miss Wagner to break her contract and perform for him; and the court held this a tort. The decision is grounded upon the ancient action for enticement of a servant; but certain of the judges indicated a wider ground. One says: Suppose a trader with intent to ruin a rival trader goes to a banker who owes money to his rival and begs him not to pay the money which he owes him, and by that means ruins his rival, — it seems that an action could be maintained. Exchange Telegraph Company *v.* Gregory[2] raises the same issue. Plaintiff furnished the official news service from the London Stock Exchange. The brokers, the customers, were obliged to contract not to furnish the tape news to non-subscribers. One customer furnished the quotations to the defendant, an outside broker, who published them. Here it is seen the competition was carried on by inducing customers to break their contracts. The court in granting the plaintiff an injunction said: This is a mean and contemptible act; this is an illegal and unjustifiable act; this is an invasion of a right. In Heaton Button Company *v.* Dick,[3] the business necessity of such a result also appears.

[1] 2 E. & B. 216. [2] [1896] 1 Q. B. 147. [3] 55 Fed. 23.

Plaintiffs sold button fastening machines to shoe manufacturers with provision that all staples used in the machines should be bought of them; and the defendants induced the shoe manufacturers to break the contract and buy staples of them. The court granted an injunction against such competition.[1] Of course it is the customer that breaks the contract in these cases. The wrong by the second merchant is the destruction of the contract right of the first merchant. That is tortious *per se;* therefore, that is unfair competition. And it is believed it is also the sense of the business community, that where a contract intervenes competition is barred.

Of that second situation is the mass of cases brought before the courts upon unfair competition. The customer is open to all — he may have him who can get him. But the customer must be gotten by fair methods; but unfair methods may not be used. With certain unfair methods the courts deal promptly; while with certain other unfair methods the courts deal hesitantly. That seems to be because a theory which serves well enough in the obvious cases of unfair competition fails when applied to the obscure cases of unfair competition. But by any theory certain methods are unfair: fraud is unfair; disparagement is unfair; coercion is unfair. In these large divisions many torts are grouped; the classification is untechnical; yet such wide divisions may be useful.

Competition may not be carried on by fraud. Unfair competition of this sort has become too common in modern trade; but the courts bid fair to check it. Perhaps Wamsutta Mills *v.* Fox[2] is as plain as any case. A dry goods store advertised: Men's Laundered Shirts, Wamsutta Cotton, 67c. The shirts were not made of cotton from the Wamsutta Mills, but from an inferior cotton from other mills. Wamsutta Mills may have an injunction.[3] Morgan *v.* Wendover[4] is plain fraud also. When persons came to

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[1] INDUCEMENT OF BREACH OF CONTRACT UNFAIR. — Exchange Telegraph Co. *v.* Gregory, *supra;* Hewitt *v.* Ontario Co., 44 Upp. C. Q. B. 287; Angle *v.* R. R., 151 U. S. 1; R. R. *v.* McConnell, 82 Fed. 65; Chipley *v.* Atkinson, 23 Fla. 206; May *v.* Woods, 172 Mass. 11; Delz *v.* Winfree, 80 Tex. 400; Duffies *v.* Duffies, 76 Wis. 374; Boyson *v.* Thorn, 98 Cal. 578; Ashley *v.* Dixon, 48 N. Y. 430; Chambers *v.* Baldwin, 91 Ky. 158; Land Co. *v.* Commission Co., 138 Mo. 439.

[2] 49 Fed. 141.

[3] FRAUD UNFAIR. — Howe *v.* McKernan, 30 Beav. 547; Chapleau *v.* La Porte, 16 Rap. Que. 189; Lawrence Co. *v.* Tenn. Co., 138 U. S. 537; Evans *v.* Von Laer, 32 Fed. 153; Jewell *v.* Bigelow, 66 Ill. 452; Marsh *v.* Billings, 7 Cush. 322; Hughes *v.* McDonough, *infra;* Rice *v.* Manley, 66 N. Y. 82. And add lists following.

[4] 43 Fed. 420.

the defendant's store and asked for Sapolio, the salesman would without explanation wrap up another soap. The plaintiffs, proprietors of Sapolio, may have an injunction against such substitution.[1] Hughes *v.* McDonough[2] is peculiar. Plaintiff, a blacksmith, had shod a horse of a customer in a proper manner. Defendant surreptitiously drew nails from the shoe so that the shoe soon came off; the special damage laid was the loss of the customer; and the court held that these things made out a tort. Coates *v.* Holbrook[3] opens another field. Defendant sold thread dressed with labels like labels of the plaintiff's. An injunction was properly granted. Cook *v.* Ross[4] is the modern form of that fraud. Bottlers of whiskey put their product upon the market in a strange square bottle with a long neck. Rival bottlers later put their product on the market in bottles of the same general appearance. The resemblance was enough to mislead ordinary customers. Properly whenever such imitation of the dress appears injunction is promptly given.[5] So the proprietors of Uneeda Biscuit have an injunction against the proprietors of Iwanta Biscuit in National Biscuit Company *v.* Baker.[6] The fraud is infringement of the trade name.[7] These principles go far. According to Reddaway *v.* Banham,[8] if the product of one trader is established in the market under the name of "Camels Hair Belting," another trader may not put his camels hair belting upon the market without taking measures to prevent confusion. Similarly American Watch Company *v.* United States Watch Company[9] holds that if the watches of one manufactory

[1] FRAUD BY SUBSTITUTION OF GOODS. — Barnet *v.* Leuchars, 13 L. T. 495; Saxlehner *v.* Eisener, 88 Fed. 61; Medical Tea Co. *v.* Kirchstein, 101 Fed. 580; Avery *v.* Merkle, 81 Ky. 75; Stonebrecker *v.* Stonebrecker, 33 Md. 252; Moroe *v.* Smith, 13 N. Y. S. 708.

[2] 43 N. J. L. 459.

[3] 2 Sandf. Ch. 586.

[4] 73 Fed. 203.

[5] FRAUD BY IMITATION OF DRESS. — Knott *v.* Morgan, 2 Keene 213; Blofield *v.* Payne, 4 B. & Ad. 410; Aver *v.* Goodwin, 30 Ch. D. 1; Coates *v.* Merrick, 149 U. S. 562; Sawyer *v.* Hubbard, 32 Fed. 388; Fairbanks Co. *v.* Bell Co., 77 Fed. 869; Dennison Co. *v.* Thomas Co., 94 Fed. 651; Hires *v.* Consumers' Co., 100 Fed. 809; Awl Co. *v.* Awl Co., 168 Mass. 154; Williams *v.* Spenser, 25 How. Pr. 365.

[6] 95 Fed. 135.

[7] FRAUD BY INFRINGEMENT OF TRADE DESIGNATION. — Crawshay *v.* Thompson, 4 M. & G. 357; Johnson *v.* Ewing, 7 A. C. 219; Witherspoon *v.* Currie, L. R. 5 H. L. 508; Reddaway *v.* Banham, *infra;* Birmingham Co. *v.* Rowell, [1897] A. C. 710; Walker *v.* Alley, B. Grant, Ch. 366; Canal Co. *v.* Clark, 13 Wall. 11; Hilson Co. *v.* Foster, 80 Fed. 896; Mossler *v.* Jacobs, 68 Ill. App. 571; Waltham Co. *v.* U. S. Co. *infra:* Saunders *v.* Jacobs, 20 Mo. App. 96.

[8] [1896] A. C. 199.

[9] 173 Mass. 85.

are known to the trade as Waltham Watches, another manufactory at Waltham cannot sell its watches as Waltham Watches without sufficient precautions against deceit. And in an extreme case, W. H. Baker Company *v.* Sanders,[1] it is held that since the product of the plaintiff establishment has long been sold in the market as Baker's Chocolate, another named Baker cannot, without distinctions, sell his product as Baker's Chocolate.[2] It will be agreed that a proper result is reached in these cases. As all these defendants have committed frauds ; therefore they have laid themselves open to suit. But notice what the plaintiffs complain of here is the diversion of custom — unfair competition.

Competition may not be carried on by disparagement. Actions of many sorts may be brought together under this head. An early case, Harman *v.* Delany,[3] is an instance. There one gunsmith advertised this of his rival: Whereas John Harman claims to make guns of two feet six inches to exceed any made by others of a foot longer this is to advise all gentlemen that said gunsmith does not dare to engage with any artist in town nor ever did make such an experiment except out of a leather gun. The court said: The law has always been very tender of this reputation of tradesmen ; and therefore these words spoken of the plaintiff in the way of his trade will bear an action.[4] Davy *v.* Davy[5] is a modern instance. This notice was issued by one grocer of another grocer: An unscrupulous grocer advertises Davy's teas and coffees with a view to deceive the public and may sell an inferior article. It was held: Such a publication could have but one purpose, namely, to injure the plaintiff in his business ; and would therefore be clearly libellous *per se.* In Western Manure Company *v.* Lawes Manure Company[6] the disparagement is of the goods. The case grew out of certain chemical tests of the artificial fertilizers of the respective

[1] 80 Fed. 889.

[2] FRAUD BY DECEIT AS TO THE SELLER. — Croft *v.* Day, 7 Beav. 84 ; Turton *v.* Turton, 42 Ch. D. 128 ; Brewing Co. *v.* Brewing Co., 1898, 1 Ch. 539 ; Singer Co. *v.* June Co., 163 U. S. 109 ; Pillsbury *v.* Pillsbury Co., 64 Fed. 841 ; Allegreth Co. *v.* Keller, 85 Fed. 643 ; Chaney *v.* Hoxie, 143 Mass. 502 ; Meyers *v.* Buggy Co., 54 Mich. 215 ; Hall's Appeal, 60 Pa. 158.

[3] 2 Strange 898.

[4] DEFAMATION UNFAIR. — Jones *v.* Littler, 7 M. & W. 423 ; Morrison *v.* Harmer, 3 Bing. N. C. 759 ; Lattimer *v.* News, 25 L. T. 44 ; South Heddon Co. *v.* Assn., [1894] 1 Q. B. 139 ; Australian Co. *v.* Bennett, [1894] A. C. 284 ; Johnson *v.* Robinson, 8 Post 486 ; Sumner *v.* Otley, 7 Conn. 257 ; Richie *v.* Widdemer, 59 N. J. L. 290 ; Morcasse *v.* Brochu, 154 Mass. 567 ; Simmons *v.* Burnham, 107 Mich. 189 ; Davy *v.* Davy, *infra.*

[5] 50 N. Y. S. 161.

[6] L. R. 9 Exch. 218.

companies, undertaken at the instance of the defendant company. The defendant's expert reported that the plaintiff's manure was of inferior quality. The plaintiff brought suit. In its declaration it declares the disparagement; it avers that the statement is wholly false; and it shows as special damage loss of custom. Upon demurrer that declaration is held good.[1] Paul *v.* Halferty[2] is more obvious. Plaintiff was about to make a sale of some mineral lands to a customer. Defendant intervened; he stated that the ore was played out; the statement was false and the defendant knew it was false. This is held a tort. In Ravenhill *v.* Upcott[3] the tort was admitted at the trial. The plaintiff had advertised for sale the Horsehill Estate. The defendant had inserted a false notice: Persons should be cautioned not to buy at that sale as the heirs are still alive.[4] The same point is seen in Lewin *v.* Welsbach Company,[5] a bill setting forth that defendants have sent to the trade a false, malicious, and intimidating circular, to the effect that the plaintiffs are infringing patents of the defendants, is good upon demurrer. In the law of torts these various actions have various names: Defamation, Trade Libel, Slander of Title. In regard to each are many technicalities; but considered in a large way these cases are to the same effect. A disparaging statement is made; the statement is false; damage to the trade results. Methods of this sort are tortious *per se.* Yet notice again that the gravamen is the diversion of custom — unfair competition.

Competition may not be carried on by coercion. The early cases show that issue in simplicity. Keeble *v.* Hickeringill[6] is an elemental case. Keeble had a decoy. Hickeringill discharged six guns laden with gunpowder, and with the noise did drive away the

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[1] DISPARAGEMENT OF GOODS UNFAIR. — Fen *v.* Dixie, Wm. Jones 444; Western Co. *v.* Lawes Co., *supra;* R. R. *v.* Press Co., 48 Fed. 206; American Co. *v.* Gates, 85 Fed. 729; Wilson *v.* Dubois, 35 Minn. 471; Mer *v.* Allen, 51 N. H. 177; Tobias *v.* Harland, 4 Wend. 537; Lubricating Co. *v.* Oil Co., 42 Hun 153; Paul *v.* Halferty, *infra.*

[2] 63 Pa. 46.

[3] 33 Justice of Peace 299.

[4] SLANDER OF TITLE UNFAIR. — Pennyman *v.* Reabanks, Cro. Eliz. 427; Malachy *v.* Soper, 3 Bing. N. C. 371; Halsey *v.* Brotherhood, 19 Ch. D. 386; Ravenhill *v.* Upcott, *supra;* Alford *v.* Choate, 20 Upp. Can. C. P. 471; Lewin . Welsbach Co., *infra;* Collins *v.* Whitehead, 34 Fed. 121; Hill *v.* Ward, 13 Ala. 310; McDaniel *v.* Baca, 2 Cal 326; Webb *v.* Cecil, 9 B. Mon. 198; Swan *v.* Toppan, 5 Cush. 104; Dodge *v.* Colby, 108 N. Y. 445.

[5] 81 Fed. 904.

[6] 11 East 574 n.

wild fowl. It is decided: Where a violent act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases; but if a man doth him damage by using the same employment, no action would lie for spoiling the custom, because he has as much liberty to carry on a trade as the plaintiff. Tarleton *v.* McGawley [1] is most obvious. The master of the ship Bannister was trading with the natives on the coast of Africa; and the master of the ship Othello put an end to that trade by firing upon the natives in their canoe. Action lay for the interference; for that must be a tort when violence is used by a competitor to keep customers away from a rival.[2] In Railroad Company *v.* Hunt [3] an engineer was arrested for some malicious reason; and the company properly was given an action for interference with its business. And the principle should apply, whatever the nature of the legal wrong. Mobile *v.* Water Supply Co.[4] may be cited here. In that case the city constructed a water system and a sewer system. Then it instituted competition against the existing water supply company by charging customers of that company the same price for sewage that it charged others for both water and sewage. This discrimination in public calling is held unfair competition. In all of these cases what is done by the defendant is tortious *per se.* But note again that the complaint of the plaintiff is diversion of custom by an unfair method.

It is agreed that competition by these methods is actionable — fraud, disparagement, coercion. The problem now is upon what ground does the competitor sue. One theory is brief. It is said there is a recognized tort here. The defendant has perpetrated a fraud; or the defendant has made a false statement; or the defendant has used force. These things it is said are tortious *per se.* But why are these torts against the competitor? For instance, one competitor wraps goods in a package similar to the package of his competitor. The customer is deceived into buying the goods of the one for the goods of the other. The customer therefore can

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[1] Peake 205.

[2] COERCION UNFAIR. — Garrett *v.* Taylor, Cro. Jac. 567; Iverson *v.* Moore, 1 Salk. 15; Keeble *v.* Hickeringill, *supra;* Carrington *v.* Taylor, 11 East 571; Tarleton *v.* McGawley, *supra;* Ibbotson *v.* Peat, 3 H. & C. 644; Green *v.* Omnibus Co., 7 C. B. (N. S.) 290; Higgins *v.* O'Donnell, Ir. R. 4 C. L. 91; Springhead Co. *v.* Riley, L. R. 6 Eq. 551; Dominion Co. *v.* McKenna, 30 Fed. 48; R. R. *v.* R. R., 54 Fed. 730; Hopkins *v.* Stave Co., 83 Fed. 912; Wire Co. *v.* Wire Union, 90 Fed. 608; Barr *v.* Trades Council, 53 N. J. Eq. 101; Vegelahn *v.* Guntner, 167 Mass. 92.

[3] 55 Vt. 570.

[4] 30 So. 445.

declare in deceit. But the competitor was never deceived for one minute by what was done. He cannot declare in deceit. His complaint must be that his customer is taken from him and taken by a fraudulent method. Upon a like foundation is the complaint of the competitor in case of disparagement. In slander of title, for instance, the seller who sues the liar knows that the lie is a lie. The real basis of his complaint is that a customer is lost to him and taken from him by a lie told his customer. This discrimination is most obvious in the case of coercion. For instance, one tradesman uses force to keep a customer from the shop of a rival tradesman. The customer may of course sue for assault and battery. May the rival tradesman who was not present sue for assault and battery? Obviously not; and yet he has his suit. That is the distinction proposed here. The suit of the tradesman is not for the tort of assault and battery — he has never been assaulted and beaten. The declaration of the tradesman is: that there has been an invasion of his business right; that a customer has been kept away by a method tortious *per se;* that the act is therefore without justification. This other theory, one sees, is long.

One difficulty with the briefer theory is that it does not explain the situation; another difficulty is its limitation, for unless the interference with the customer by one competitor is a tort against the customer, the competitor who is damaged can have no action by the briefer theory under any circumstance whatever. In this longer theory there is a possibility of further application if there be necessity. Let two cases be compared. In Graham *v.* Street Railway,[1] a foreman posted a notice that employees dealing with a certain grocer would be discharged. The court holds that the grocer has an action, on the ground that there is malicious interference with his business. On the other hand, in Robinson *v.* Texas Land Association,[2] a corporation gave its employees the option to deal at the company store or leave the employment. But the court holds that a rival storekeeper has no action for such interference. Now it is submitted that both cases are rightly decided; and this is the explanation offered. In neither case, it is to be noted, is any tort committed against the customers; but in both cases there is a *prima facie* tort against the tradesman, — the intentional invasion of his business right to have customers come undisturbed. In the first case that interference is done with

[1] 47 La. Ann. 214.

[2] 40 S. W. 843.

a motive that cannot be justified — malice. In the second case that is done with a justification — competition. This involves the recognition of a *prima facie* right to have customers come to one undisturbed. This also necessitates the acknowledgment that when a customer is taken away there is a *prima facie* tort. This also requires the establishment of a justification for fair competition. But it is not impossible that all this may be.

The same distinction is taken in two Minnesota cases. In Bohn Manufacturing Company *v.* Hollis,[1] the case first decided, certain retail lumber dealers refused to deal with a wholesale dealer who sold lumber direct, — this was held no tort. In Ertz *v.* Produce Exchange,[2] it appeared that without cause the members of the Exchange had refused to have dealings with a certain commission merchant, — this was held a tort. The court claims the right to hold one way in the first case and another way in the second case. It is said: The defendants had similar legitimate interests of their own to protect in the first case which were menaced by the practice of wholesale dealers in selling direct to consumers; but in the second case from all that appears there was the sole purpose of injuring the plaintiff's business. In other words, it is held a tort to interfere with the business of a man; but if that interference is in the course of competition, there is a justification allowed. By such a distinction as this many other cases which by the briefer theory cannot be reconciled are by the longer theory accommodated. Moreover, the theory that there must be an act done tortious *per se* against the customer is of too limited application. In the course of modern trade most serious wrongs may be done a merchant by most despicable means without the commission of any tort against the customer. Shall the person who diverts the custom without any justification go free? If so the law will be found in crucial instances to furnish a most inadequate protection against oppression; but if, on the other hand, the one who interferes with the business of another is put to his justification, the law furnishes a complete remedy, excusing no man who does not show his excuse.

It is this same issue that one sees exposed in a succession of cases in Massachusetts. In Vegelahn *v.* Guntner,[3] it appeared from the report that some upholsterers had gone upon a strike for higher wages. The method they employed to keep other workmen from coming to fill their places was in some cases violence, and was in

[1] 54 Minn. 223. [2] 79 Minn. 140. [3] 167 Mass. 92.

some cases persuasion. The majority of the court forbade the picket altogether. Mr. Justice Holmes thought that violence should be enjoined, but not persuasion: the conflict between employers and employed is, he said, competition; competition justifies the intentional infliction of damage by interference with a man's business, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade; this is permitted upon considerations of policy and of social advantage. In Plant *v.* Woods,[1] it appeared that there were two labor unions in the same craft, and that one union had threatened a strike if members of the other union were retained in the employment. The majority of the court again forbade this altogether. Mr. Justice Holmes again dissented: this mode of approaching the question I believe to be the correct one, he said. I agree that the conduct of the defendants is actionable unless justified; I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted; I think that here the unity of organization aimed at is necessary to make the contest of labor effectual. In Moran *v.* Dumphy[2] one count was for inducing the employer to discharge the plaintiff from his employ by malevolent advice. Mr. Chief Justice Holmes spoke for the court in this case; he said: It must now be taken to be settled that while intentional interference may be privileged if for certain purposes, yet, if due only to malevolence it must be answered for; that the notion that the employer's immunity must be a non-conductor so far as any remote liability is concerned is disposed of; finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear. Mr. Chief Justice Holmes is cited at length here because the theory that is put forward in this article is owed to him more than to any one else.

Let this hypothesis be applied to the most important cases in English law upon this subject in late years. In Mogul Steamship Company *v.* McGregor,[3] the defendants drove the plaintiffs from the trade by smashing the freights and by giving a special rebate in addition to those that shipped by the defendant's lines exclusively. It is said in that case: The courts could not attempt to limit competition to a normal standard of prices — there is no such limitation; nor could they enjoin the defendants from forcing customers to come to them by this device of the differen-

[1] 176 Mass. 492. [2] 177 Mass. 485. [3] L. R. 23 Q. B. D. 598.

tial rate — that is no more than competition. It is suggested that Allen *v.* Flood[1] might well have been so decided on its facts. In that case it seems a *prima facie* tort against the man discharged for the representative of one union to demand the discharge of that member of the other union. The competition existing between the unions might, however, be a justification. The *ratio decidendi* of the majority in the House of Lords is indeed to the contrary. It is said that there are no *prima facie* torts. That view seems destined to have less influence upon the law than was at first supposed, if we are to judge by the subsequent course of decision. For now Quinn *v.* Leatham[2] is the ruling case. The plaintiff in this case was a flesher, the defendant was an official in a butcher's union. Because the plaintiff would not discharge a non-union man, the defendant threatened a strike against one of the plaintiff's customers unless he refused to deal with the plaintiff. The customer acceded; and the plaintiff was ruined. The House of Lords held that all this made out a tort. Upon these reasons it seems: first, that a tradesman has a right to have his dealings with his customers undisturbed; second, that an intentional invasion of that right may result in a legal wrong to the tradesman, although the customer suffer no legal wrong; third, that unless a good justification for what has been done is put forward the tort must be answered for; fourth, if what is done is tortious *per se* — conspiracy in the principal case — there can be no justification possible.

At all events this hypothesis is here defended. Competition is not of the nature of an absolute right. Rather competition is of the nature of a justification, allowed at the present because of present policy. In the process of competition may be pointed out every element of a *prima facie* tort. In certain instances that cannot be justified. The courts are quite prepared to say upon established principles that if the act of interference be a fraud or a disparagement or a coercion against the customer — they will not listen to any justification. More than that: if the method of competition be not tortious *per se,* but be of a sort that the community should condemn, the courts grant no justification for that *prima facie* tort.[3] That makes the standard of what methods shall be considered unfair in competition and what methods shall be consid-

[1] [1898] A. C. 1.

[2] [1901] A. C. 495.

[3] COMPETITION WITHOUT LEGAL WRONG TO THE CUSTOMER UNFAIR. — Temperton *v.* Russell, [1893] 1 Q. B. 715; Quinn *v.* Leatham, *supra;* Glass Mfg. *v.* Bottle

ered fair in competition the sense of the buiness community at last. There that issue is well rested. It remains true that any competition whatever has every element of a *prima facie* tort. How, then, can competition be a justification, even when it is fair? There can be but one ground for that justification — public policy. That competition in the general case and by the usual methods should be free is the economic ideal of our time. Free competition is held worth more to society than it costs. And the judges have the same social imagination as other men. Therefore, although interference with the business of another is a tort — fair competition is a justification. There is no principle of law here; the discussion of the question belongs to economics, not to law. Unless, indeed, this be a principle of law: whenever the mass of men firmly believe that a certain policy is for their social advantage — that policy will be found to be at the same time the policy of the law.

Bruce Wyman.

Blowers, 59 N. J. Eq. 49; Graham *v.* St. R. R., *supra;* Lucke *v.* Assembly, 77 Md. 396; Vegelahn *v.* Guntner, *supra;* Plant *v.* Woods, *supra;* Ertz *v.* Produce Exchange, *supra;* P. *v.* Duke, 44 N. Y. S. 336; Curran *v.* Galen, 152 N. Y. 33; Crawford *v.* Wick, 18 Oh. St. 190; Mattison *v.* R. R., 3 Oh. Dec. 526; Payne *v.* R. R., 3 Lea 507; Bailey *v.* Plumbers' Assn., 103 Tenn. 99; Delz *v.* Winfree, 80 Tex. 400.

WHEN FAIR. — Mogul S. S. Co. *v.* McGregor, *supra;* Lyons *v.* Wilkins, 67 L. J. Ch. 383; Jenkinson *v.* Nield, 8 Times L. R. 421; Allen *v.* Flood, *supra;* Boots Co. *v.* Grundy, 82 L. T. 769; Clemmet *v.* Watson, 14 Ind. App. 38; Meyer *v.* Stone Cutters, 47 N. J. Eq. 519; Brewster *v.* Miller, 101 Ky. 368; Bohn Co. *v.* Hollis, *supra;* Heyward *v.* Tillson, 75 Me. 225; Knights *v.* Laborers, 60 N. Y. S. 388; Tube Co. *v.* Allied Mechanics, 7 Oh. N. P. 87; McCauley *v.* Tierney, 14 R. I. 255; Robinson *v.* Land Assn., *supra;* Raycroft *v.* Traintor, 68 Vt. 219.